

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of:

NO ON KNIGHT-NO ON PROP. 22
and CARY DAVISON, TREASURER

FPPC Case No. 2000/354

OAH No. N-2001070620

Respondents.

PROPOSED DECISION

On September 25, 2001, in Sacramento, California, Denny R. Davis, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Michelle L. Bigelow, Counsel, represented the complainant.

Bradley W. Hertz represented respondents.

Evidence was received, the record was closed and the matter was submitted on September 25, 2001.

ISSUE

The essential question is whether respondents violated the California Political Reform Act and if they did are they subject to a civil penalty, and if so, how much. Complainant requests an order assessing a civil penalty of \$2,000, assessable against both respondents jointly and severally. The civil penalty assessable, if any, will be based on the culpability, if any, of the respondents.

FACTUAL FINDINGS

1. Wayne K. Strumpfer, Executive Director, Fair Political Practices Commission ("Commission") signed the Accusation in his official capacity and not otherwise.

2. At all times relevant herein respondent, No On Knight- No On Prop. 22, was a Recipient Committee as defined in Government Code section 82013. This committee was organized to defeat Proposition 22, which was scheduled for the March 7, 2000 election. At

all times relevant herein respondent Cary Davidson was the designated Treasurer of the No On Knight-No On Prop. 22 Committee. At all times relevant herein respondent, No On Knight- No On Prop. 22 committee, and respondent, Cary Davidson, were subject to the requirements of Government Code section 84203, which provides for the reporting of late campaign contributions and section 82036, which defines a late-contribution.

3. Government Code section 84203 requires the reporting of contributions within 24 hours because the legislature recognized that the relatively condensed 16-day period immediately preceding an election is the most active in terms of campaign activities, including fund-raising and contributions. The identity of campaign contributions, the value or dollar amounts, the donors and recipients are considered important public information intended for the consumption of the electorate. It is important therefore that timely disclosures are made during this condensed period of time to facilitate the promulgation of information.

4. For the election period herein involved the late-contribution-reporting period was between the dates of February 20, 2000 to March 6, 2000. For this period respondents filed a late-contribution report but that report did not include a \$20,000 contribution from, Ballot Initiative Strategy Center, (hereinafter referred to as "BISC").

5. Respondent's committee received in its bank account a \$20,000 contribution by electronic transfer from contributor BISC on March 2, 2000. Because this contribution was made on March 2, 2000, it was a "late-contribution" within the meaning of Government Code sections 84203 and 82036. Being a late-contribution, respondents were required to file a report disclosing the receipt of the \$20,000 contribution within 24 hours. Government Code section 84203 requires that a late-contribution be reported within 24 hours from the time it is made in the case of the candidate or committee that makes the contribution and within 24 hours from the time it is received in the case of the recipient committee, as is the case with the herein respondents. This reporting requirement is imposed equally on the person or entity making the contribution and upon the recipient candidate or committee. The time lines for both recipient and donor are the same; 24 hours. Respondents did not timely file the required report. The contribution was reported but it was not reported until July 31, 2000. Respondents did not file a late-contribution report for the \$20,000 contribution. On March 6, 2000, respondent received a money transfer notification from the depository bank, but respondent did not file a late report. If said report had been filed immediately upon receipt of the bank notice, although late, the filing would have taken place prior to the election. Respondents violated the law. Respondent's violation is serious because it deprived the public of information about a contributor of funds intended to influence the outcome of a contested proposition campaign.

6. Because this particular contribution was transferred electronically respondent asserted that the contribution did not get placed on a list for the late-contribution filing. The individual fund-raiser that collected the contribution informed the contributor, BISC, how to electronically transfer money directly into the committee's bank account. Treasurer

Davidson was not informed about this contribution. The fund-raiser's testimony that he did not inform respondent Davidson about the electronic transfer was credible. However, the failure of a staff person to inform respondent is not persuasive as a factor in mitigation.

7. The committee was not structured or set-up to receive contributions by electronic transfers. Davidson's firm has always maintained a policy to discourage contributions by electronic transfer. This policy is based on past practices and knowing how difficult it is to monitor such contributions. His policy did not however expressly prohibit this means of transmittal. In fact for this committee and during this campaign period two or three electronic transfers occurred. The difficulty experienced by respondent in managing the transmittal and receipt of contribution information by electronic means is not persuasive as a factor in mitigation.

8. Respondent asserted that the No On Knight-No On Prop. 22 campaign was a grassroots effort, which necessarily included a broad-based source of contributors. This argument is without merit if it was proffered to create an inference that being broad-based and grassroots, respondents had little control over the method or transmittal of funds. In this case the donor, BISC, is a political action group presumably sophisticated in the manner by which funds are transferred and reported. Respondent's contention is not persuasive as a factor in mitigation.

9. Because respondent was aware of the difficulty associated with monitoring electronic transfers, he and his staff maintained a high alert, looking at all transmittals including e-mails during the 16-day late-contribution period. All staff members were instructed to monitor all e-mails for late-contributions and to report to Davidson directly. For this committee, Davidson established a protocol and an individual folder for each committee, and its contributions including late-contributions to ensure accurate and complete reporting. These factors are important in illustrating the technical difficulty faced by respondents and all similarly situated committees and Treasurers, however the difficulty faced by entities and persons operating in this field does not serve as factors in mitigation. Respondent failed to comply with the requirements of the law, the law is clear; a report must be filed, notwithstanding the level of difficulty.

10. Respondent Davidson has served as treasurer for California political candidates and committees for twenty years. He has been affiliated with Reed and Davidson since 1988. Davidson holds himself out to the consuming public as a professional political campaign Treasurer. He has been Treasurer for more than 100 political campaigns. He has never been the subject of an FPCC action before the present Accusation. The reporting violation herein is not part of a pattern [California Code of Regulation (CCR) Title 2 section 18361(e)(4)(E)]. He has no prior record of violations of the Political Reform Act. These are important factors in mitigation.

11. An expert in California campaign filing requirements was called to testify by Complainant. He is a Political Campaign Analysis who has been employed by the Secretary of State for 15 years. He praised respondent Davidson as being one of the best in the field.

In his opinion the failure to report the contribution was not intentional, he opined it was an oversight. His opinion is valued as a factor in mitigation.

12. The failure to disclose the \$20,000 contribution from BISC was not intentional.

13. Complainant asserts that respondents should be held responsible for the failure to report the \$20,000 contribution on a strict liability basis. Complainant construes the mandate within Government Code section 81003 to authorize the application of a strict liability construction.

14. Respondent asserts that an allocation of the fine, if any, be assessed against both respondents, because the statute permits joint and several liability. The committee is liable for the failure to include the \$20,000 contribution in the late-contribution report. However, respondent Davidson assumed the responsibility for the committee to timely file all reports. Further, there was no independent evidence showing culpability of the committee. Davidson was the servant of the committee and it was he who had the duty to institute procedures to assure complete and accurate filing and reporting of all contributions.

15. The complainant asserts this was a serious violation. It was serious, however considering all factors including those of mitigation the proposed \$2,000 fine is excessive. An appropriate civil penalty in this case is \$500.00. It is assessable against both defendants jointly and severally.

LEGAL CONCLUSIONS

1. Government Code section 82036 provides as follows:

"Late-contribution" means any contribution including a loan which totals in the aggregate one thousand dollars (\$1,000) or more that is made to or received by a candidate, a controlled committee, or a committee formed or existing primarily to support or oppose a candidate or measure before the date of the election at which the candidate or measure is to be voted on but after the closing date of the last campaign statement required to be filed before the election.

2. Government Code section 84203 provides as follows:

(a) Each candidate or committee that makes or receives a late contribution, as defined in Section 82036, shall report the late contribution to each office with which the candidate or committee is required to file its next

campaign statement pursuant to Section 84215. The candidate or committee that makes the late contribution shall report his or her full name and street address and the full name and street address of the person to whom the late contribution has been made, the office sought if the recipient is a candidate, or the ballot measure number or letter if the recipient is a committee primarily formed to support or oppose a ballot measure, and the date and amount of the late contribution. The recipient of the late contribution shall report his or her full name and street address, and the date and amount of the late contribution. The recipient shall also report the full name of the contributor, his or her street address, occupation, and the name of his or her employer, or if self-employed, the name of the business.

(b) A late contribution shall be reported by facsimile transmission, telegram, guaranteed overnight mail through the United States Postal Service, or personal delivery within 24 hours of the time it is made in the case of the candidate or committee that makes the contribution and within 24 hours of the time it is received in the case of the recipient. A late contribution shall be reported on subsequent campaign statements without regard to reports filed pursuant to this section.

(c) A late contribution need not be reported nor shall it be deemed accepted if it is not cashed, negotiated, or deposited and is returned to the contributor within 24 hours of its receipt.

(d) A report filed pursuant to this section shall be in addition to any other campaign statement required to be filed by this chapter.

3. Government Code section 82013 provides as follows:

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year.

(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

4. Title 2 section 18421.1 provides as follows:

Except as otherwise provided by law, the following standards shall be applicable to contributions and expenditures:

(a) A monetary contribution is "made" on the date that the contribution is mailed, delivered, or otherwise transmitted to the candidate or committee. Alternatively, the date of the check or other negotiable instrument by which the contribution is made may be used in lieu of the date on which the contribution is mailed, delivered, or otherwise transmitted, provided it is no later than the date the contribution is mailed, delivered, or otherwise transmitted.

(b) Notwithstanding subdivision (a), for purposes of the disclosure of late contributions, as defined in Government Code Section 82036 and pursuant to Government Code Section 84203, a monetary contribution is "made" on the date the contribution is mailed, delivered, or otherwise transmitted to the candidate or committee. Consistent with California Code of Regulations, Title 2, Section 18401, the candidate or committee shall maintain documentation to support the date the contribution was made.

(c) A monetary contribution is "received" on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made. All contributions received by a

person acting as an agent of a candidate or committee shall be reported to and disclosed by the candidate or committee, or by the committee's treasurer, no later than the closing date of the next campaign statement that the committee or candidate is required to file.

(d) Notwithstanding subdivision (c) above, a monetary contribution collected by means of payroll deductions or membership dues by a membership organization for its sponsored committee pursuant to Government Code Section 82048.7(b)(2) is "received" by the committee on the earlier of the following:

(1) The date that the committee obtains actual possession or control of the contribution;

(2) Within 60 days after the receipt of the payment by the committee's sponsor.

(e) A nonmonetary contribution is "made" by the contributor, and "received" by the candidate or committee, on the earlier of the following dates:

(1) The date that funds are expended by the contributor for goods or services, if the specific expenditure is made at the behest of the candidate or committee;

(2) The date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the goods or services, or the date that the candidate or committee otherwise receives the benefit of the expenditure.

(f) The standards for when a contribution is "made" and "received" set forth in this section are not applicable where a contribution is disposed of pursuant to Government Code Sections 84211(q), 84203(c), or California Code of Regulations, Title 2, Section 18531.

5. When an electronic transfer occurs the failure to receive a confirmation of that contribution does not alter the fact or timing of a contribution. The failure to inform a committee Treasurer that a contribution was made does not alter the fact that a contribution has been received. Actual knowledge of a committee Treasurer that a contribution has occurred does not alter the fact that a contribution has occurred. The date that the candidate or committee, or the agent of the candidate or committee, obtains

possession or control of the goods or services constitutes receipt. The contribution was made on March 2, 2000, and it was received on March 2, 2000. The requirement to file the report is imposed without a showing that the recipient was aware that the contribution had been made. The fact that the contribution was made by means, the nature of which rendered the recipient thereof difficult to detect, does not excuse respondents from violating Government Code sections 84203 and 82036. Respondent did not intend to conceal the contribution. Rather, respondent negligently failed to obtain information that BISC had contributed the funds and thereupon respondent failed to include that "received" contribution in the filed report. Respondent is held strictly responsible for compliance with Government Code sections 84203 and 82036 and California Code of Regulations Title 2 section 18421.1.

6. The relationship between Davidson and his client committee places the ultimate responsibility on Davidson to file reports. The error of an employee or staff-person will not insulate respondents. Davidson is an expert in the field. He is responsible for devising mechanisms to ensure compliance with the requirements of provisions of the Political Reform Act.

7. Government Code section 83116 provides:

When the Commission determines there is probable cause for believing this title has been violated, it may hold a hearing to determine if such a violation has occurred. Notice shall be given and the hearing conducted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 5, Sections 11500 et seq.). The Commission shall have all the powers granted by that chapter. When the Commission determines on the basis of the hearing that a violation has occurred, it shall issue an order which may require the violator to:

(a) Cease and desist violation of this title;

(b) File any reports, statements or other documents or information required by this title;

(c) Pay a monetary penalty of up to five thousand dollars (\$5,000) per violation to the General Fund of the state. When the Commission determines that no violation has occurred, it shall publish a declaration so stating.

8. Title 2 section 18361 (e)(4) provides:

(e) Administrative Hearings.

(4) Factors to be Considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code Section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

(A) The seriousness of the violation;

(B) The presence or absence of any intention to conceal, deceive or mislead;

(C) Whether the violation was deliberate, negligent or inadvertent;

(D) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code Section 83114(b);

(E) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(F) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

9. Respondent's violation was serious because the purpose for the late-contribution provision of the Political Reform Act was defeated. The failure to report the contribution deprived the public of information about a contribution intended to influence the outcome of a contested proposition campaign. Respondents' violation did not involve an intention to conceal or deceive the public. It was an inadvertent oversight. The violation was isolated and it was not part of a pattern of violations.

ORDER

Respondent committee, No On Knight- No On Prop. 22, and respondent Cary Davidson, Treasurer are ordered to remit, jointly and severally, a civil penalty in the total amount of \$500.

Dated: October 26, 2001

D. R. Davis

DENNY R. DAVIS

Administrative Law Judge

Office of Administrative Hearings